United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

75-7280

NO. 75-7280

RAMSEY CLARK and CHANDRA CARR,

Plaintiffs-Appellants

-against-

ALEX ROSE, DONALD SZANTHO HARRINGTON, THE LIBERAL PARTY OF THE STATE OF NEW YORK, THE STATE EXECUTIVE COMMITTEE, JACOB R. JAVITS and ARTHUR H. SCHWARTZ, REMO J. ACITO, WILLIAM H. McKEON and DONALD RETTALIATA as members of the State Board of Elections,

Defendants-Appellees

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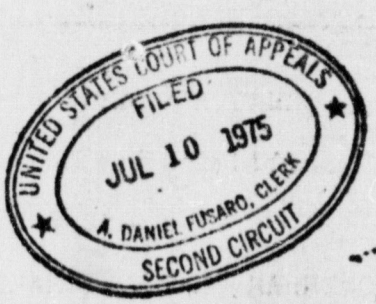
P/S

BRIEF FOR APPELLANTS-PLAINTIFFS



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Defendants.

BRIEF FOR APPELLANTS-PLAINTIFFS

QUESTIONS PRESENTED

1. Did the District Court err in refusing appellants the opportunity to develop and present facts to show that the Wilson-Pakula law (New York Election Law, § 137) was unconstitutional as applied by the Liberal Party?

2. Did the appellants state a valid cause of action in asserting that the Wilson-Pakula law as applied by the Liberal Party was unconstitutional in that it denies Liberal Party members the opportunity to vote for non-party candidates on an equal basis and delegates to the party leadership unconstitutional control over the nominating process?

STATEMENT OF THE CASE

PRELIMINARY STATEMENT

This appeal challenges a ruling of the District Court (Tyler, J.) which dismissed appellants cause of action attacking the constitutionality of the Wilson-Pakula law (New York Election Law § 137) as applied by the Liberal Party. The District Court's decision would not permit the appellants to present any facts to show that regardless of whether the law could be justified in other circumstances, its application by the Liberal Party leadership constituted an unconstitutional infringement of the right of Liberal Party members to pick their own candidates for statewide office. It is appellants claim that the law effectively disenfranchises these members and permits the most pernicious kind of boss-rule and that the court below should have allowed the development of facts to show this deprivation.

THE NEW YORK STATUTE

The New York Election Law provides three methods of designation by which a candidate can be named for party nomination to a statewide office, such as that of U. S. Senator:

(1) By majority vote of the State Committee at a meeting held during a specified period preceding the primary election, the period in the last election being June 9 through June 15, 1974; § 131.2(b)(1);

(2) By receiving 25% of more of the total vote cast in the State Committee on any ballot at said meeting, and thereafter making a timely prescribed demand to the Secretary of State for entry of his name as a candidate for the nomination, § 131.2(b)(3); and

(3) By a designating petition signed by not less than 20,000 or 5% of the enrolled voters of the Party in the State, whichever is less, containing signatures of at least 100 residents from each of one-half of the Congressional districts of the State, § 136.5.

The three methods of designation are limited by the Wilson-Pakula Law, enacted in 1947.

The Wilson-Pakula Law imposes a general prohibition on the right to designate or nominate as a party candidate any person who is not enrolled as a member of the party at specified times: in the case of a designating petition, at the time of the filing of the petition, § 137.1, and in the case of a committee nomination, at the time of the filing of the certificate of nomination, § 137.2

The requirements of the Wilson-Pakula Law can be waived. In the case of a statewide office, the candidacy of a non-member may be authorized by the State Committee, or such other committee as the rules of the party may provide, at a meeting, by a majority vote of those present, provided a quorum is present, § 137.4.* The statute

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* The Liberal Party has provided by rule for the exercise of this waiver power by the defendant State Executive Committee.

contains no standards for the exercise of this power of waiver, nor does it make any provision for review of its exercise.

If only one person is designated for the office of United States Senator, and the office is "uncontested" as defined in § 2.3-a, the person designated would be deemed nominated without balloting at the primary election, § 149.

FACTS

Plaintiff Clark repeatedly sought opportunities to present his candidacy for the Liberal party's nomination for U. S. Senator in 1974 to the members of the Party's State Committee and requested that the primary be open. These efforts are reflected in correspondence which had been submitted to the Court below. (See 34 a - 45 a). Plaintiff Clark's requests were all either ignored or denied.

At the meeting held on June 15, 1974, the names of Senator Javits, plaintiff Clark and one other candidate were placed in nomination. Senator Javits won the designation by a large majority. Plaintiff Clark received slightly more than 8% of the vote.

A resolution was then offered which would have permitted non-member candidates for the nomination for U. S. Senator to circulate designating petitions on the same basis as enrolled members. This resolution was defeated.

PRIOR PROCEEDINGS

The complaint in this action was filed on Monday, June 17,

1974, by plaintiff Clark, and plaintiff Chandra Carr, a Liberal Party member and District Leader who supported his candidacy.

The complaint had two causes of action: the first described the workings of the statute on its face; the second cause of action focused specifically on the application of the statute in terms of Liberal Party practice. Paragraph 21 specified: "As a matter of longstanding practice, the foregoing powers over the designation and nomination of candidates have actually been and are now so controlled by defendant Rose alone or by defendant Rose and other liberal Party members. This longstanding actual control... has deprived and is depriving plaintiffs and others....of federally protected rights."

On June 26, 1974, appellants moved, by order to show cause, for the convening of a three-judge court pursuant to 28 U.S.C. §2281. On July 11, 1974, the single judge district court granted the motion. (15 a - 21a) A hearing was held before the three-judge court on July 17, 1974. On July 19, 1974, appellants submitted a memorandum in support of their claim that the statute was unconstitutional and also submitted nine pieces of correspondence, all dated May and June, 1974, dealing with appellant Clark's effort to secure the Liberal Party designation for U.S. Senator in 1974. On July 30, 1974, the statutory three judge court issued its opinion holding that the Wilson-Pakula law was not unconstitutional. (53 a - 67a).

The three judge court's opinion did not distinguish between the first and second causes of action. However, it seems

clear that the court's opinion focused only on the facial validity of the Wilson-Pakula law. Because of the tight time pressure involved in the pre-election phase of the case, the only facts that were presented related to the first cause of action. Thus Mr. Schilling, counsel for appellants below, made the following comments prior to the argument before the three judge court on July 17, 1974:

> "JUDGE MANSFIELD: I see.
>
> Are there any disputed issues of fact, or at least any disputed issues of fact that are material and relevant to the question of constitutionality of this being argued?
>
> MR. SCHILLING: Your Honor, I would say that in all likelihood there are not. We have not pinned it down, however, and I ... would ... suggest that perhaps we could explore that today.
>
> We have an outline of the facts that we believe are material to the first count, and I think that it would be possible on a recitation of those facts to discover to what extent if at all they are disputed." (31 a)

Thus no facts were presented on the control of the Liberal Party State Committee by defendant Rose, and the court did not mention the possible impact of this control on the applicability of the law. The court in its opinion considered the law only as written and not as applied.

Indeed, the court specifically noted that "upon the facts

presented by plaintiffs in this case," i.e. facts relating to the first cause of action, the statute was valid. (65a)

The three-judge court upheld the validity of the law on its face asserting that New York State "has a 'legitimate interest in regulating the number of candidates on the ballot' ..... and in 'avoiding confusion..... of the democratic process'.... that can result from an excessive number of non-party candidates." It stated that the "law is a discreet mechanism to satisfy a compelling state interest, the avoidance of greater confusion and possible weakening and even usurpation of party organization." (60 a - 61 a). 379 F. Supp. at 76.

After the three-judge court rendered its decision on July 29, 1974, the three appellees moved to dismiss the complaint before the single judge district court which convened the three-judge court. (See 68 a - 85 a). On March 14, 1975, the single judge district court dismissed the action in these words:

"It is true, of course, that the three-judge panel, as it was obliged to do under relevant federal law, confined itself strictly in its July 29, 1974 opinion to deciding the attack on the constitutionality of § 137. This meant that the statutory court was technically considering the first of the two stated claims in plaintiffs' complaint. As a practical matter, however, the statutory court of which the undersigned was a member was aware of the conceded facts of candidate Clark's attempts to persuade the Liberal Party

to designate him under the Wilson-Pakula Law. Under those conceded facts, the panel could see no constitutional infirmity in the statute on its face, and so held. Further, though it was unnecessary to so decide, this member of the panel, who was the writer of that opinion, could conceive of no reason or basis to perceive that § 137 had been applied in an unconstitutional manner vis-a-vis plaintiffs. Thus, in effect, as defendants now argue, the statutory court really decided all of the issues in this case. Concededly, counsel for plaintiffs has made an ingenious effort to cast up all kinds of "issues" and factual inquiries which he says should be considered by the court consisting of one Judge (see pages 10 and 11 of plaintiffs' Brief in Opposition to these motions). But as I read and understand the ingenious list of factual inquiries set forth by counsel, it amounts to a general rummage of irrelevant historical facts and statistics which have nothing to do with the present interests of former candidate Clark and Chandra Carr as a member of the Liberal Party of New York." (87a - 89a)

A timely notice of appeal was thereafter filed from Judge Tyler's decision.

ARGUMENT

POINT I

THE SINGLE JUDGE DISTRICT COURT ERRED IN NOT PERMITTING APPELLANTS TO DEVELOP AND PRESENT FACTS TO SHOW THAT THE WILSON-PAKULA LAW WAS UNCONSTITUTIONAL AS APPLIED BY THE LIBERAL PARTY

The complaint in this action contained two causes of action, one of which attacked the Wilson-Pakula Law on its face and the other as applied by the Liberal Party. The single judge district court conceded that the three-judge court did not consider the second cause of action involving the statute as applied.* The court claimed, however, that "Though it was unnecessary to so decide, this member of the panel, who was the writer of that opinion, could conceive of no reason or basis to perceive that § 137 had been applied in an unconstitutional manner vis-a-vis plaintiffs." (88 a).

With all due respect to the district judge below, it is anomalous for him to assert that he could conceive no reason or basis to perceive that § 137 had been applied in an unconstitutional manner and then to deny appellants any opportunity to make such a showing. It is a fundamental tenet of constitutional law that a law fair on

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* It said in footnote 3 of its opinion:

> "Count 2 of plaintiffs' complaint seems to state that the statute is being administered in an unconstitutional way. Such a claim, however, does not require the convening of a three-judge court. Phillips v. United States , 312 U.S. 246 (1941); Agur v. Wilson, Docket No. 73-1529 (2d Cir. filed May 24, 1974); Calvan v. Levine, 490 F. 2d 1255 (2d Cir. 1973). (21a)

See also: Cassidy v. Ceci, 320 F. Supp. 223 (E.D. Wisc. 1970), BBS Productions, Inc. v. Purcell, 360 F. Supp. 801 (D. Ariz. 1973).

its face may be applied in a unconstitutional manner. As the Supreme Court has said: "A statute may be invalid as applied to one set of facts and yet valid as applied to another," Dahnke-Walker Milling Company v. Bondurant, 257 U.S. 282, 289 (1921). Justice Brandeis noted in his famed concurrence in Whitney v. California, 274 U.S. 357, 378-79. (1927).

> As a statute, even if not void on its face, may be challenged because invalid as applied....., the result of such an inquiry may depend upon the specific facts of the particular case. Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue [relating to unconstitutionality].

In election law cases, the importance of presenting precise facts on the application of a law is extremely important. In one of the Supreme Court's most recent cases on the subject Storer v. Brown, 415 U.S. 724 (1974), the plaintiffs had attacked the validity of certain sections of the California Elections Code which placed restrictions on independent candidates for elective public office. The sections under attack prohibited independent candidates from seeking to run for office within one year of having a registered affiliation with a qualified political party. (§ 6830(d)) Another section required a candidate to file nominating papers signed by 5% to 6% of the entire vote cast in the preceding general election in the area for which the candidate sought to run. (§6831) These signatures had to be obtained during a 24-day period following

the primary (§6833) and none of the signatures could be gathered from persons who voted at the primary election. (§6830(c))

The Supreme Court upheld the validity of the party disaffiliation requirements of § 6830(d) since the law "furthers the State's interest in the stability of its political system." 415 U.S. at 736.

However, the Court remanded that part of the case relating to the petitioning procedures. The Court noted:

> Beyond the one-year party disaffiliation condition and the rule against voting in the primary, both of which Hall apparently satisfied, it was necessary for an independent candidate to file a petition signed by 5% of the total number of votes cast in California at the last general election. This percentage, as such, does not appear to be excessive, see Jenness v. Fortson, supra., but to assess realistically whether the law imposes excessively burdensome requirements upon independent candidates it is necessary to know other critical facts which do not appear from the evidentiary record in this case. 415 U.S. at 738

As examples of the facts to be developed the Court noted:

> It is necessary in the first instance to know the "entire vote" in the last general election. Appellees suggest that 5% of that figure, whatever that is, is 325,000. Assuming this to be the correct total signature requirement, we also know that it must be satisfied within a period of 24 days between the primary and the general election. But we do not know the number of qualified voters from which the requirement must be satisfied within this period of time. California law disqualifies from signing the independent's petition all registered voters who voted in the primary. In theory, it could be that voting in the primary was so close to 100% of those registered, and new registrations since closing the books before primary day were so low, that eligible signers of an unaffiliated candidate's petition would number less than the total signatures required. Ibid. at 739.

The Court concluded:

> We are quite sure, therefore, that further proceedings should be had in the District Court to permit further findings with respect to the extent of the burden imposed on independent candidates for President and Vice President under California law. Standing alone, gathering 325,000 signatures in 24 days would not appear to be an impossible burden. Signatures at the rate of 13,820 per day would be required, but 1,000 canvassers could perform the task if each gathered 14 signers a day. On its face, the statute would not appear to require an impractical undertaking for one who desires to be a candidate for President. But it is a substantial requirement; and if the additional likelihood is, as it seems to us to be, that the total signatures required will amount to a substantially higher percentage of the available pool than the 5% stipulated in the statute, the constitutional claim asserted by Hall is not frivolous. Before the claim is finally dismissed, it should be determined whether the available pool is so diminished in size by the disqualification of those who voted in the primary that the 325,000-signature requirement, to be satisfied in 24 days, is too great a burden on the independent candidates for the offices of President and Vice President. Ibid. at 740.

Thus, the Court noted the importance on developing the precise facts regarding an election scheme to determine the actual impact of the law on a candidate's constitutional right to run for office and the voter's right to support him.*

This approach was ignored by the court below. The three-judge court made a series of questionable assumptions about the impact of the Wilson-Pakula Law. Even if these assumptions were justified when the court examined the validity of the law on its face, they were not justified in terms of the actual practice of the Liberal Party.

For example, the three-judge court stated that the Wilson-Pakula Law worked no hardship on Appellant Clark since under § 148

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* See also Marston v. Lewis, 410 U.S. 679 (1973); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970).

of the Election Law, a "non-party member who has the support of twenty thousand or five percent, whichever is less, of the enrolled voters of the party can secure permission to have the members write in his name at a primary election. This can be done without the authorization of the State Committee or the State Executive Committee." (65 a) (379 F. Supp. at 78 .)

However, the single judge district court gave appellants no opportunity to show that this procedure under § 148 was totally unrealistic given the time available to secure the signatures, the lack of cooperation by the party leadership and the difficulty of securing write-in votes. This is precisely the kind of information which the Supreme Court required to be developed in Storer.

Similarly, the three-judge court asserted that without the Wilson-Pakula law an "infinite number" of candidates might try to run for Liberal Party nomination thereby leading to voter "confusion" (60 a) (379 F. Supp at76) Elsewhere it noted "If to open the Liberal Party to one non-member candidate were to open it to five, ten, or non-member candidates, voter confusion at a primary election would be a real possibility." (63 a) (379 F. Supp. at 77). /This assumption made by the court when examining the facial validity of the law can be challenged by appropriate facts. Since the Liberal Party has invariably backed only the candidates of the major parties (except in the rare instance when it put up its own candidate) the danger of an "infinite" number of candidates or even "five, ten, or twenty" is totally unrealistic. Since the law also requires a certain number of designating petitions

before a non-party candidate can run, appellants could show that the danger noted by the three-judge court was unlikely in the context of a Liberal Party primary.

In addition, the three-judge court asserted that the State Committee is elected in a way to insure that it "accurately reflects the views of the Liberal Party members."/ (61a) Thus, its refusal to execute a Wilson-Pakula law waiver even if delegated to the State Executive Committee presumably reflected the views of the entire party. Appellants offered to show to the district court that this assumption was contrary to the facts in the Liberal Party but was denied an opportunity to do so.

Finally, the three-judge court referred in its opinion to the need for the party to put up candidates that "best reflect their party's philosophy and views." (64 a) (379 F. Suppl. at 78). However, election statistics show that the Liberal party, except in the rarest cases, has supported the candidates of the major parties. It is one thing to say that a party which always runs its own candidates can impose barriers to non-party members seeking to enter its primaries. It is quite another for a party tightly controlled by its leaders to bestow its nomination on one major party candadate without giving the other major party candidate any opportunity to challenge that gift by appealing to the party members at large.

POINT TWO

THE ACTUAL OPERATION OF THE WILSON--PAKULA LAW TO HAVE BARRED APPELLANT CLARK AND OTHERS FROM ANY EFFECTIVE PARTICIPATION IN THE LIBERAL PARTY'S PRIMARY BURDENS APPELLANT'S FUNDAMENTAL CONSTITUTIONAL RIGHTS.

The Supreme Court has made fundamentally clear:

> "No right is more precious in a free country than that of having a choice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

The right to vote and the related right of a candidate to access to the ballot are fundamental rights which can be burdened by government only to the extent necessary to protect a compelling and substantial governmental interest. Storer v. Brown, 415 U.S. 724 (1974). The right of an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters. Lubin v. Parish, 415 U.S. 709 (1974). As Mr. Chief Justice Burger observed in Lubin, 415 U.S. at 716:

> "...the right to vote is 'heavily burdened' if that vote may be cast only for one of two candidates in a primary election at a time when other candidates are clamoring for a place on the ballot."

In this case there was no choice at all, and the burden was even heavier. The candidate of the Liberal Party was chosen without any vote having been cast by the enrolled voters of the Liberal Party.

The Wilson-Pakula Law "heavily burdens" the exercise of fundamental rights under the First and Fourteenth Amendments in several ways: it denies non-member Liberal Party candidates equal access to the primary election ballot; it vests an arbitrary power in the committee of a political party to discriminate among non-member candidates; it denies enrolled members of the Liberal Party free choice among non-member candidates in favor of enrolled candidates. The law burdens the exercise of constitutional rights of candidates and voters in other primary elections and in the general election. The Wilson-Pakula Law deprives voters in the general election of equal protection and their right under the Seventeenth Amendment to have the Senators of a State elected "by the people thereof." *

It is appellant's position that when a hard look is taken at the facts and circumstances behind the Wilson-Pakula Law, at the interest which the State claims to be protecting, and at the lack of any standards guiding the exercise of the waiver power, the result of the process will be an unmistakable conclusion that the heavy burdens which are being placed on the exercise of appellant's

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* As election statistics demonstrate, the votes cast on the Liberal line in state-wide elections far exceed the number of enrolled Liberal Party members, and have an important, in some instances decisive, bearing on the outcome. Thus, any dilution of votes or other harm flowing from undemocratic flaws in the Liberal Party primary continue into the general election and may there indeed have a magnified effect on the rights of voters and candidates.

fundamental rights are constitutionally impermissible.

The extent to which the Wilson-Pakula law operates to stifle effective exercise of rights of association requires a sophisticated and subtle appreciation of a great many interrelated factors which appellants seek an opportunity to show upon remand. The difficulties and dilemmas, pitfalls and uncertainties it presents for the would-be candidate are not easily described, and are certainly not adequately conveyed by the present, fragmentary record.

A. In the context of the New York Election Law as a whole, the State interests that may be served by the waiver provisions of the Wilson-Pakula Law are not compelling.

The Wilson-Pakula Law is an anomaly in the New York Election Law. In allowing the blocking of candidate's access to the ballot, the Law is inconsistent with the State's longstanding general policy of freely allowing multiple candidacies and cross endorsements in the interest of affording voters full choice in the exercise of the franchise. In this respect the New York Election system differs sharply with that of California, at issue in Storer, which in general relegates candidates to one place on the ballot, and imposes corresponding restrictions on access to the ballot.

The case law confirms this general policy of New York, and leaves to the Legislature little or no power to restrict the access of candidates to the ballot. Matter of Callahan, 200 N.Y. 59 (1910)

(invalidating § 136 of the Election Law forbidding a committee of any party, or independent body authorized either to make nominations or to fill vacancies to nominate a candidate of another party or independent body for the same office); Devane v. Touhey, 33 N.Y. 2d 48, 349 N.Y.S. 2d 361 (1973) (invalidating § 138-b which provided that any candidate who has received and accepted the nomination of a party for office other than judicial or statewide shall not be eligible to receive the nomination of any independent group for the same office for the same year); United Ossining Party v. Hayduk, 357 F. Supp. 962 (1971) (three-judge court) (also holding § 138-b to be invalid).

The Wilson-Pakula Law is also inconsistent with the intent of New York's direct primary system, enacted in 1911. The direct primary system generally intends the enrolled voters to make the choice between vying candidates. Such a system does not envision it to be a function of party leadership generally to exercise a controlling influence in the choice of candidates. Rather it is to exercise an even-handed, neutral role with respect to the party's primary, as is exemplified by § 19 of the Election Law which prohibits the expenditure of party funds in aid of the designation or nomination of any person to be voted for at a primary election. For purposes of assessing the substantiality of the interest the State may have in the purposes served by the Wilson-Pakula Law, it is pertinent to note that the Liberal Party's consistent practice with respect to state-wide offices is to support the candidates of one of the two major parties. This regular use of the Wilson-Pakula

waiver power by the party leadership presents a sharper conflict with the policy of the direct primary law than would be presented if the power were used only rarely in exceptional circumstances. It also reduces the substantiality of the State's interest in keeping this law on the books.

The justification most often advanced for restrictions against the entry of unenrolled candidates in a party's primary is a need to guard against inter-party raiding and to maintain the integrity of the election process. It should be noted that the dangers of inter-party raiding by candidates differ from those posed by voters that were accepted as compelling in Rosario v. Rockefeller, 410 U.S. 752 (1973). Voters who gain enrollment are free to cast a harmful ballot. Candidates remain subject to voter scrutiny and rejection.

Nonetheless, it is undoubtedly true that under some circumstances a State will have an interest in protecting a political party against inter-party raiding by candidates. The weight to be attached to these considerations, which it must be recognized are based largely on the self-interest of the party, are minimal in a situation like the present case where the party by its own action has granted access to one non-member candidate, who indeed is the only person who was ever really considered or in contention. Under these circumstances there can be no realistic danger of inter-party raiding. To the contrary, the Wilson-Pakula Law has in effect been

used as though it conferred a power of appointment in the State Committee, which it does not, to confer exclusive consideration and that power has been arbitrarily exercised to violate fundamental constitutional rights.

Although the New York cases, including the lower court opinions upholding the Wilson-Pakula Law, have found that the Law serves a state interest in protecting against inter-party raiding, it is important to note that those cases did not consider whether the Wilson-Pakula Law serves state interests that are "compelling" as that term has evolved in the federal case law or whether the state interests that the law serves can be served equally well in significantly less burdensome ways.

B. The Wilson-Pakula Law is unconstitutional because the waiver power it vests in a Committee of a Political Party lacks any standards and is not tied to a particularized legitimate purpose.

As was emphasized in Storer v. Brown, it was crucial to the result in Rosario that the restrictions upon voting rights that were upheld were tied to a particularized legitimate purpose. Rosario, of course, involved objective, fixed restrictions that operated uniformly and served fixed, discernable purposes. Quite the reverse is true of the Wilson-Pakula Law's waiver power: it lacks any standards or objective criteria and as a result is untied to any particularized purpose.

It is obvious that the power is susceptible of being used, not just to protect against inter-party raiding, which is its osten-

sible purpose, but as a means of advancing interests of the party or the party leadership -- interests that could well be totally unrelated to the integrity of the election process, as for example, obtaining political advantage for the party from the votes (far in excess of its enrollment) that are regularly cast on its ballot line and often have an important, even decisive bearing on the outcome. Such uses of the waiver power might not only fail to serve the state interest the waiver power was ostensibly designed to serve, they might in fact affirmatively disserve them. Thus, even if the state interests which the Wilson-Pakula Law serves are "compelling," which plaintiffs dispute, the Law is unconstitutional because there is no assurance the Law will serve these purposes.

The waiver power of the Wilson-Pakula Law operates much like a permit system, allowing some to exercise their rights of association and precluding others from any effective opportunity to do so. In such an area of vital First Amendment freedom, such an arbitrary power, unlimited by standards or means of review, is constitutionally impermissible. Cf. Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); Staub v. City of Baxley, 355 U.S. 313 (1958).

It makes no difference as far as the issue of constitutionality is concerned that the waiver power is vested in a committee of a political party, a private organization. The Wilson-Pakula waiver involves a public electoral function that is subject to constitutional

safeguards; it is not a matter of internal party management. Seergy v. Kings County Republican County Committee, 459 F. 2d 308 (2d Cir. 1972). The doctrine of "state action" requires that the Wilson-Pakula waiver power be scrutinized by the same constitutional standards as apply to governmental action.

The specific issue that was raised in Seergy was whether the make-up of the committee had to comply with the one-man, one-vote rule. Seergy held that such compliance was required when the committee performed a public electoral function. No issue was raised as to the constitutionality of any powers conferred upon the committee or of any actions of the committee.

The Wilson-Pakula Law provides that the waiver power is exercisable "at a meeting of the members of the party committee representing the political subdivision of the office for which a designation or nomination is to be made, or of such other committee as the rules of the party may provide..." This provides no assurance that the power will be exercised by a committee which meets the one-man, one-vote standard, and indeed the Liberal Party's rules make the power exercisable by the State Executive Committee whose make-up does not meet one-man, one-vote standards. Cf. Redfearn v. Delaware Republican State Committee, 502 F. 2d. 1123 (3d Cir. 1974).

The problem, however, is deeper than the make-up of the committee. If the waiver power were exercisable only by a committee

whose make-up satisfies the one-man, one-vote rule, this alone would not bring constitutional inquiry to an end any more than the fact that a legislative body was properly apportioned would make it unnecessary to consider the constitutionality of its acts.

The Wilson-Pakula Law waiver power is not simply a matter of choice, as is for example the State Committee's designation. Except for the State Committee's designation, the Election Law assigns the choice of candidates to the enrolled voters of a party. The waiver power, if it is to be sustained, must be shown to be necessarily required by the compelling state interests that are claimed for it, and carefully limited to protect those interests by standards and review.

The lower court opinions in the New York cases which in 1947 upheld the constitutionality of the Wilson-Pakula Law relied in part on the concept that a political party's primary election was a private matter.* If that concept was not mistaken then, it is surely mistaken now, Cf. Moore v. Ogilvie, 394 U.S. 814 (1969), overruling MacDougall v. Green, 335 U.S. 281 (1948).

The Supreme Court held in Kusper v. Pontikes, 414 U.S. 51, 58 (1973) that a state law which prevented an enrolled party member from participating in primary elections for too long a period and

* Ingersoll v. Curran, 188 Misc. 1003, 70 N.Y.S. 2d 435 (Spec. Term Albany County), affirmed without opinion 297 N.Y. 522 (1947); Ingersoll v. Hefferman, 188 Misc. 1047, 71 N.Y.S. 2d 687 (Spec. Term N.Y. County), affirmed without opinion, 297 N.Y. 524 (1947).

"deprived her of any voice in choosing the party's candidates," was invalid. Similarly a party practice of tight leadership control combined with the Wilson-Pakula Law also deprives enrolled party members like appellant Carr "of any voice in choosing the party's candidates." Appellants should have an opportunity to prove that such a practice exists and that its effect is to make the Wilson-Pakula Law an effective bar to party democracy in the choosing of candidates.

CONCLUSION

As now written and practised by the Liberal Party, the Wilson-Pakula Law's waiver provision gives a committee acting under color of law the power to deny fundamental constitutional rights for any or no reason. The power can be exercised arbitrarily. It is overbroad. It provides no standards and is not subject to review. Appellants seek the opportunity to present the facts necessary to show why it must be declared unconstitutional.

For the foregoing reasons appellants respectfully urge this Court to reverse the decision of the single judge district court and to allow appellants to prove its second cause of action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that 2 copies of Plaintiffs-Appellants Brief and 1 copy of Plaintiffs-Appellants Appendix was sent by first class mail this 10th day of July, 1975 to the following counsel of record:

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